

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH WITHERS,

Defendant-Appellant.

UNPUBLISHED

December 10, 2013

No. 312252

Wayne Circuit Court

LC No. 12-004028-FC

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first degree criminal sexual conduct (CSC I) under alternate theories, MCL 750.520b(1)(c) (penetration during the commission of any other felony) and MCL 750.520b(1)(f) (force or coercion), as well as kidnapping, MCL 750.349(1)(c). He was sentenced to concurrent sentences of 8 to 15 years' imprisonment and now appeals as of right. We affirm.

I. BASIC FACTS

The victim, an admitted drug addict, testified that she came to Detroit on March 22, 2012, to "get high." The victim had used heroin a couple hours before encountering defendant at a gas station. The victim asked defendant for bus money to get home. Defendant offered her a ride and indicated that he had a few stops to make first. At this point, the victim was not afraid and went willingly. They stopped at a liquor store and also at a "weed" or "crack house." Defendant asked if the victim liked to masturbate. At that point, the victim became fearful and tried to change the subject. Defendant ordered her to masturbate and told the victim that "he wasn't taking me home unless I did what he wanted me to."

Eventually, they stopped at the Hell Raisers Biker Club. They parked in the back parking lot. The victim testified that defendant ordered her to perform fellatio and told her that he would take her home after she helped clean up the club. When the victim tried to take her purse into the club, defendant grabbed it and said she was not taking it inside or talking to anybody. However, she had put her cell phone in her pocket.

Once in the club, defendant retrieved cleaning supplies and ordered the victim to take off her shirt. They cleaned for a while and then defendant pulled the victim's arm and said they were going into the back room. Defendant told her to "get naked" and laid a towel down on a

futon. The victim began to cry and asked if defendant would take her home. Defendant said, "Yeah, if you get me off I will." Defendant told the victim to touch herself. He got on top of her and put his fingers inside her vagina and rectum. She told him it hurt and pushed him away. Defendant tried to have sexual intercourse with her. He put his penis partially into her vagina. At some point, defendant got off of her and she said she had to use the bathroom. Defendant let her go in the bathroom alone. She called 911. Defendant attempted to have sexual intercourse with the victim when she came out of the bathroom, but he was inebriated and having trouble staying awake. She shoved defendant off of her and "bolted out the door" where she encountered police officers. A nurse specializing in sexual assault examinations found injuries that were consistent with the history the victim gave.

Defendant testified that he had consensual sex with the victim on the night in question. He first encountered the victim at the gas station. Defendant agreed to take her home if she would accompany him to a store and to do a quick cleanup of the club.

Defendant testified that as they drove he asked the victim if she liked to masturbate. She "said yes with a big smile on her face." Defendant asked if she would mind if he watched. In the parking lot of the biker's club, defendant asked if he could "have some head." The victim willingly complied. After they finished, the victim got her cell phone out of her purse; defendant told her she could not take her purse into the club because it contained a syringe for drug use. Once in the club, defendant told the victim that she looked sexy but would look sexier with her shirt off. She took it off and continued cleaning in her bra. As she cleaned, she kept asking about "blow."

Defendant testified that the victim went to use the members-only bathroom. She came out, shut the door, took off all her clothes, and "started playing with herself." Defendant retrieved a towel from the car and placed it under the victim. The victim performed fellatio and masturbated some more. She was smiling and moaning. Then defendant started to rub himself against her. He did not put his penis in her vagina or his finger in her anus. She said to get a condom, and defendant started to do that. But then the victim said she had to use the bathroom again. After the victim came out, police arrived and he was arrested. Defendant believed that the victim accused him of rape because she did not "get her fix" on time.

The jury convicted defendant of Count I, CSC I "sexual penetration, penis into genital opening using force or coercion or during the commission of a felony;" Count III, CSC I "finger in the anal opening using force or coercion or during the commission of a felony," and Count IV, kidnapping. Defendant was acquitted of CSC III, fellatio. The court sentenced defendant to concurrent sentences of 8 to 15 years' imprisonment. He now appeals as of right.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that he was denied the effective assistance of counsel based on his attorney's "serious error" in failing to cross-examine the victim regarding her mental health

history. We disagree. Defendant did not move for a new trial or to remand for a *Ginther*¹ hearing. As such, our review is limited to mistakes apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To prevail on a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficient performance was prejudicial. *Cullen v Pinholster*, ___ US ___, 131 S Ct 1388, 1403; 179 L Ed 2d 557 (2011); *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "To demonstrate prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998).

Defense counsel is given wide latitude in matters of trial strategy, and there is a strong presumption of effective assistance of counsel. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Failure to present evidence can constitute ineffective assistance only where the defendant is deprived of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Contrary to defendant's argument, defense counsel did, in fact, raise the issue of the victim's mental health history. In denying defense counsel's request for medical records, the trial court stated that "many witnesses have psychological issues" and that it was "not the place of this Court to go delving into everybody's mental health history and issues when there is not any evidence that when this happened she was being affected by any of those things."

In any event, the victim's mental health issues were presented to the jury. The medical record from the sexual assault exam was admitted at trial, and thus the jury would have had access to the information that the complainant was on Zoloft and had a history including post-traumatic stress disorder and depression. Moreover, as the court noted, there was no showing that these conditions or medication would have affected her perception. Much more likely to have affected the victim's perception and ability to recall was the heroin she had used two hours before meeting defendant. The jury knew about this and still chose to believe her over defendant. For these reasons, defense counsel did not commit a "serious error" in failing to cross-examine the complainant on her psychiatric history, and there was no showing that any error would have prejudiced the defendant. Defendant has not shown that he was denied the effective assistance of counsel.

III. SUFFICIENCY OF THE EVIDENCE

Defendant claims that the evidence was insufficient to support the jury's verdicts. "We review a sufficiency issue by considering the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could find each element of the offense proved beyond a reasonable doubt." *People v Comella*, 296 Mich App 643, 651; 823 NW2d 138, 493 Mich 905 (2012).

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

The evidence was sufficient to sustain defendant's convictions of kidnapping and CSC I. Kidnapping requires that the defendant "knowingly restrain" a person with intent to do one of several things, in this case to engage in "criminal sexual penetration or criminal sexual contact with" the person. MCL 750.349(1)(c).

As used in this section, "restrain" means restrict a person's movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts. [MCL 750.349(2).]

Additionally, "sexual penetration occurring 'under circumstances involving the commission of any other felony' is [] automatically criminal sexual conduct." *People v Waltonen*, 272 Mich App 678, 690; 728 NW2d 881 (2006).

There was sufficient evidence to support defendant's convictions. Once at the club, defendant would not let her talk to anyone and stayed nearby most of the time. She kept asking if he would take her home (her only purpose in getting into his car), and at one point, he said, "Yeah, if you get me off." The victim told the 911 operator that defendant "will not let me go" and "keeps me" and "I can't get out of here." Her testimony was corroborated by police, who saw her running from the building partially clothed, crying and hysterical. Even one member of the motorcycle club testified that she "looked frantic." He said she "came running past me" and "had her shirt over herself, holding herself." The victim sustained personal injury, including bleeding tears in her labia minora and anus. And, although defendant claimed that the acts were consensual, whether to believe the victim's or defendant's testimony was a matter for the jury. It is not this Court's function to reweigh credibility. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012).*Id.* at 331.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan